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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GENARO CAMPOS, JR.,

Plaintiff,

v.

SRIVASTAVA, et al.,

Defendants.

CASE NO. 1:10-cv-641-LJO-MJS (PC)

FINDINGS AND RECOMMENDATION  
RECOMMENDING DISMISSAL WITH  
PREJUDICE OF PLAINTIFF'S FIRST  
AMENDED COMPLAINT FOR FAILURE TO  
STATE A CLAIM

(ECF No. 11)

OBJECTIONS DUE WITHIN THIRTY DAYS

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Plaintiff Genaro Campos, Jr. ("Plaintiff") is a former state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

Plaintiff initiated this action on April 13, 2010. (Am. Compl., ECF No. 1.) No other parties have appeared in this action. In a January 23, 2012 Screening Order, the Court dismissed Plaintiff's Complaint with leave to amend for failure to state a claim. (ECF No. 10.) Plaintiff filed a First Amended Complaint on February 27, 2012. (ECF No. 11.)

Plaintiff's First Amended Complaint is now before the Court for screening. For the reasons set forth below, the Court finds that Plaintiff's First Amended Complaint also fails

1 to state a claim.

2 **I. SCREENING REQUIREMENT**

3 The Court is required to screen complaints brought by prisoners seeking relief  
4 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
5 § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has  
6 raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which  
7 relief may be granted, or that seek monetary relief from a defendant who is immune from  
8 such relief. 28 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion  
9 thereof, that may have been paid, the court shall dismiss the case at any time if the court  
10 determines that . . . the action or appeal . . . fails to state a claim upon which relief may be  
11 granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).  
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14 A complaint must contain “a short and plain statement of the claim showing that the  
15 pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are  
16 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by  
17 mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.  
18 Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).  
19 Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim that is  
20 plausible on its face.’” Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 555).  
21 Facial plausibility demands more than the mere possibility that a defendant committed  
22 misconduct and, while factual allegations are accepted as true, legal conclusions are not.  
23  
24 Id. at 1949-50.

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1 **II. SUMMARY OF PLAINTIFF'S FIRST AMENDED COMPLAINT**

2 It appears Plaintiff previously was housed at some unnamed California state prison.<sup>1</sup>  
3 Plaintiff is no longer in custody. (ECF No. 9.) He sues the following individuals for  
4 inadequate medical care under the Eighth Amendment: 1) Dr. Srivastava, a  
5 doctor/surgeon, and 2) Dr. Zepp, a state prison doctor.  
6

7 Plaintiff asks that his hand be repaired, that Defendants cover his legal and medical  
8 costs, and that he be awarded \$4.4 million in damages.

9 Plaintiff alleges as follows:

10 While incarcerated, Plaintiff suffered from painful carpal tunnel syndrome.<sup>2</sup> (Am.  
11 Compl. at 3.) At some point during his treatment Defendant Zepp referred Plaintiff to a  
12 Doctor Brenner for a surgery consultation. (Id.) However, a Defendant Srivastava  
13 performed the surgery on Plaintiff's left hand, purportedly because he charged a lesser fee  
14 than Doctor Brenner. (Id.) Plaintiff noticed no improvement after surgery. (Id.) Defendant  
15 Zepp referred Plaintiff back to Defendant Srivastava for removal of the stitches in Plaintiff's  
16 hand, but Defendant Srivastava refused to see him. (Id.) Defendant Zepp sent Plaintiff to  
17 Doctor Brenner who simply sent Plaintiff back to Defendant Zepp. (Id.) Plaintiff's symptoms  
18 are the same as before surgery. His hand needs to be examined to determine the damage  
19 inflicted by Defendant Srivastava. (Id.)  
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25 <sup>1</sup> Plaintiff's original Complaint suggested he had been housed at Wasco State Prison Reception  
26 Center. (Compl., ECF No. 1 at 1.) His First Amended Complaint does not indicate where the events  
underlying his claims occurred.

27 <sup>2</sup> Plaintiff does not reflect any dates relevant to his allegations.

1 **III. ANALYSIS**

2 Section 1983 “provides a cause of action for the ‘deprivation of any rights, privileges,  
3 or immunities secured by the Constitution and laws’ of the United States.” Wilder v. Virginia  
4 Hosp. Ass’n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). Section 1983 is not  
5 itself a source of substantive rights, but merely provides a method for vindicating federal  
6 rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94, 109 S. Ct. 1865  
7 (1989).

8  
9 To state a claim under section 1983, a plaintiff must allege two essential elements:  
10 (1) that a right secured by the Constitution or laws of the United States was violated, and  
11 (2) that the alleged violation was committed by a person acting under the color of state law.  
12 See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d 1243,  
13 1245 (9th Cir.1987).

14  
15 Plaintiff appears to be alleging that Defendants Zepp and Srivastava, medical  
16 personnel, violated Plaintiff’s Eighth Amendment rights by providing him with inadequate  
17 medical care for his carpal tunnel impairment.

18  
19 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an  
20 inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439  
21 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285  
22 (1976)). The two part test for deliberate indifference requires Plaintiff to show (1) “‘a serious  
23 medical need’ by demonstrating that ‘failure to treat a prisoner’s condition could result in  
24 further significant injury or the unnecessary and wanton infliction of pain,’” and (2) “the  
25 defendant’s response to the need was deliberately indifferent.” Jett, 439 F.3d at 1096  
26 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other  
27

1 grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal  
2 quotations omitted)).

3 The existence of a carpal tunnel condition requiring corrective surgery suggests the  
4 existence of a serious medical condition. However, Plaintiff's suit does not arise out of the  
5 creation or existence of that condition, but rather with the way it was treated surgically.  
6 Plaintiff has not provided information that would enable the Court to determine if and how  
7 the surgery went amiss and, if it did, how that led to a serious medical complication. As the  
8 Court noted in its original Screening Order, it cannot determine whether the first part of the  
9 two part test has been met. Plaintiff was given one chance to amend and instructions as  
10 to what would be necessary to state a cognizable claim. He has failed to do so.<sup>3</sup> It is  
11 reasonable to conclude that Plaintiff would not be able to adequately plead a serious  
12 medical condition even if given further opportunity to amend.  
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15 Even if Plaintiff had properly pled a serious medical condition, he has failed to allege  
16 sufficient facts to enable the Court to conclude Defendants were deliberately indifferent to  
17 Plaintiff's medical needs. To show deliberate indifference, Plaintiff must show "a purposeful  
18 act or failure to respond to a prisoner's pain or possible medical need, and harm caused by  
19 the indifference." Id. (citing McGuckin, 974 F.2d at 1060). "Deliberate indifference is a high  
20 legal standard." Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004). "Under this  
21 standard, the prison official must not only 'be aware of the facts from which the inference  
22 could be drawn that a substantial risk of serious harm exists,' but that person 'must also  
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26 <sup>3</sup> The Court notes Plaintiff's suggestion that he needs the relief he prays for here to enable him to  
27 determine what went wrong with his surgery. The Court is not able to provide that or any other relief  
unless and until Plaintiff states a cognizable claim.

1 draw the inference.” Id. at 1057 (quoting Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct.  
2 1970 (1994)). “If a prison official should have been aware of the risk, but was not, then the  
3 official has not violated the Eighth Amendment, no matter how severe the risk.” Id. (quoting  
4 Gibson v. Cnty. of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)).

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6 In this regard, Plaintiff alleges little more than that Defendants injured him in some  
7 manner because the originally recommended physician did not do the surgery and his hand  
8 was “still the same” after the surgery as it had been before surgery. As Plaintiff previously  
9 was informed, to show deliberate indifference, he must describe some purposeful act or  
10 failure to respond to a medical need. Plaintiff has no right to the surgeon of his choice. “[A]  
11 difference of opinion between a prisoner-patient and prison medical authorities regarding  
12 treatment does not give rise to a § 1983 claim.” Turner v. Greenman, 2011 WL 1343120,  
13 \*3 (E.D. Cal. Apr. 7, 2011) (quoting Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981).  
14 Similarly, Plaintiff has no right to a guarantee of surgical success. See, e.g., Stephenson  
15 v. Kaiser Found. Hospitals, 203 Cal.App.2d 631, 636, 21 Cal.Rptr. 646 (1962) (“[A] doctor  
16 is not a warrantor of cures or required to guarantee results.”) Thus, neither a failure to  
17 provide a particular physician or the failure of surgery to give the desired relief creates a  
18 deliberate indifference claim.  
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21 Accordingly, Plaintiff has failed to state a claim for inadequate medical care under  
22 the Eighth Amendment. Despite having been given leave to amend and instruction as to  
23 how to amend to state a cognizable claim, Plaintiff still has not alleged facts that would  
24 support a claim that Defendants were deliberately indifferent to a serious medical condition.  
25 He complains only of a dissatisfaction with the choice of surgeon and the outcome of the  
26 surgery. No useful purpose would be served in giving Plaintiff the same instruction and  
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1 opportunity to amend again.

2 **IV. CONCLUSION AND RECOMMENDATION**

3 The Court finds that Plaintiff's First Amended Complaint fails to state any Section  
4 1983 claims upon which relief may be granted against the named Defendants. Under Rule  
5 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when  
6 justice so requires." In addition, "[l]eave to amend should be granted if it appears at all  
7 possible that the plaintiff can correct the defect." Lopez v. Smith, 203 F.3d 1122, 1130 (9th  
8 Cir. 2000) (internal citations omitted). However, in this action, Plaintiff has filed two  
9 complaints and received substantial guidance from the Court in its Screening Order. (ECF  
10 Nos. 1, 10, & 11.) Even after receiving the Court's guidance, Plaintiff failed to include  
11 additional facts to address the noted deficiencies. Because of this, the Court finds that the  
12 deficiencies outlined above are not capable of being cured by amendment, and therefore  
13 recommends that further leave to amend not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Noll  
14 v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).

17 Accordingly, based on the foregoing, the Court HEREBY RECOMMENDS that this  
18 action be DISMISSED in its entirety, WITH PREJUDICE, for failure to state a claim upon  
19 which relief may be granted.

21 These Findings and Recommendation will be submitted to the United State District  
22 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
23 thirty (30) days after being served with these Findings and Recommendation, Plaintiff may  
24 file written objections with the Court. The document should be captioned "Objections to  
25 Magistrate Judge's Findings and Recommendation." Plaintiff is advised that failure to file  
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1 objections within the specified time may waive the right to appeal the District Court's order.

2 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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4 IT IS SO ORDERED.

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6 Dated: March 28, 2012

1st Michael J. Seng  
UNITED STATES MAGISTRATE JUDGE

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